Supreme Court of the United States

OCTOBER TERM, 1950.

No.

ALFRED C. GAUNT, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Alfred C. Gaunt, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered July 28, 1950, modifying and affirming as modified the judgment of the United States District Court for the District of Massachusetts and also the orders of the court entered September 19, 1950, denying petition for rehearing and motion to modify judgment.

JURISDICTIONAL STATEMENT.

The jurisdiction of the Court is invoked under 28 U. S. C. § 1254(1). In accordance with Rule 37(b) of the Federal Rules of Criminal Procedure, the time for filing this petition was extended to and including November 1, 1950, by order entered October 13, 1950.

OPINION.

The opinion of the Court of Appeals (R. 895-919) is presently unreported.

QUESTIONS PRESENTED.

1. Did the court below err in treating the mere filing of an incorrect return which understated the income of a businessman, who kept full records of his income but who did not return certain items which he believed to be non-taxable, as the affirmative and overt act of concealment which this Court in *Spies* v. *United States*, 317 U. S. 492, held necessary to subject a taxpayer to liability for the felony of wilfully evading taxes defined in Section 145(b), I. R. C., as distinguished from the misdemeanors defined in Section 145(a) (wilful failure to pay tax) and 3616(a) (fraudulent return with intent to evade tax).

2. Did the court below err in affirming the conviction of petitioner for a wilful attempt to evade taxes and a wilful subscription to a return not believed to be true and correct as to every material matter, the felonies defined in Section 145(b) and 145(c), I. R. C., where the Circuit Court affirmed on the ground that, construing the evidence in the light most favorable to the Government, "the jury could well have found that the defendant was an intelligent, astute and successful business executive with many years of experience who had full records of his income available, and that the understatements in his returns for the years involved, which he made out himself, were gross." (R. 902)

3. Did the Circuit Court err in affirming petitioner's conviction under § 145(b), I. R. C., which provides: "any person who wilfully attempts *in any manner* to evade any tax ... shall ... be guilty of a felony", where the District Court instructed the jury that one such *manner* denounced in the statute would be "the return of a tax where the form has some information and other information is deliberately omitted or understated" (R. 682), and failed utterly to instruct the jury as to the difference between the felony defined in 145(b) and the misdemeanor of filing a "false or fraudulent return with intent to defeat or evade" taxes in violation of § 3616(a), I. R. C.

4. Did the Circuit Court err in affirming petitioner's conviction of wilfully attempting to evade income taxes and fraudulently misrepresenting income, where, despite the petitioner's contention that he treated the only items in dispute in strict accordance with the applicable tax law, the District Court refused to instruct the jury as to the applicable principles of tax law on the ground that the disputed items were "doubtful" (R. 644), or the subject of "dispute" (R. 678) or which presented "complicated problems of law, as to which the parties would not be in complete agreement" (R. 679-680), or were "too complicated" (R. 686).

5. Did the Congress, by subsequently enacting § 145(c), I. R. C., which imposed the penalties prescribed for perjury upon any person making and subscribing a false return, repeal 18 U. S. C. § 80, Criminal Code § 35(A) with respect to matters specifically embraced with § 145(c).

6. Did the Circuit Court err in affirming the conviction of petitioner under Criminal Code § 35(A) on the ground that the facts alleged in the indictment constituted an offense under 145(c), I. R. C., even though the charge was framed under and the jury was instructed only as to § 35(A).

7. Did the Circuit Court err in affirming the conviction of petitioner where the evidence on the whole case was insufficient to warrant submission of any of the counts to the jury.

STATUTES INVOLVED.

The pertinent statutes are printed in the appendix, *infra*, pp. 20-22.

STATEMENT.

Petitioner is a respected businessman who has been engaged for most of his 68 years as a mill owner and operator in Massachusetts. He was indicted under Section 145(b) of the Internal Revenue Code and Section 35(A) of the Criminal Code in a number of counts each of which charged substantially that the petitioner had attempted wilfully to evade taxes on his income reported for the years 1944, 1945, and 1946. While substantially the same alleged errors were made on the returns for each of the three years involved, the jury acquitted for the year 1944 and convicted on substantially the same facts and charges for the years 1945 and 1946.

The record discloses that the petitioner at no time during the periods involved received any payments in cash (R. 149) and that during the entire period he kept accurate and full books and records of all of his receipts and transactions. As the record discloses (R. 213):

> The Court. * * * the proof, as far as I am aware, is quite plainly proof that the books were kept in due order and without any fraud. I haven't heard any evidence to the contrary. Do you recall any, Mr. Garrity?
>
> Mr. Garrity [United States District Attorney]. In the keeping of whose books?
>
> The Court. The books of the defendant.
>
> Mr. Garrity. No, your Honor.
>
> The Court. There is nothing at all to suggest he kept his books improperly. The only thing he is supposed to have done, and I am not trying to minimize it, but it is in connection with the returns to the Government. Those are supposed to be false.
>
> Mr. Garrity. That is correct, your Honor.

Indeed, the record discloses that the petitioner continued to maintain his books in precisely the same fashion and to make the identical alleged errors on his return for 1946 after the agents of the Bureau of Internal Revenue had begun to audit his returns for 1944 and 1945. (R. 419-420)

The proof against the defendant consisted exclusively of a listing by the United States of all of the checks received by petitioner during the period involved. No attempt was made by the Government to demonstrate petitioner's net income through any of the usual techniques, such as net worth increases, bank deposits, or expenditures. The Government did not attempt to analyze the transactions reflected by the checks received by the petitioner but contented itself with a blackboard demonstration by an Internal Revenue Agent of his notion of how petitioner's income should have been returned. This exercise consisted simply of a totalling of all checks received by the petitioner of whatever nature or description, with the Court allowing "the jury to conclude as to whether those are income payments or capital payments, or something else" (R. 165).

The bald approach employed by the Government was alleged to have shown two types of errors committed by the petitioner:

(1) Mechanical errors, such as mistakes in addition and double deductions, all of which were more than compensated for by similar mistakes that the petitioner made in favor of the Government. For example, his double deductions and other minor errors for the 3 years totalled $6,060.15, whereas his mistakes in the Government's favor totalled $7,730.94. This was demonstrated in Petitioner's Brief in the Court of Appeals and will be demonstrated in the brief in this Court if this writ is granted.

(2) Seven alleged errors made by the petitioner as to the nature and taxability of certain substantial items of his income and the deductibility of certain losses.

Such items almost entirely constituted the evidence on which the Government relied to prove both an actual understatement of taxes and the willful attempt at evasion.

The District Court failed, almost completely, to instruct the jury on the applicable principles of tax law involved in the treatment of such items.

All of the seven alleged substantial errors involved distinct principals of tax law, requiring closest analysis as to both form and substance. It was the petitioner's position in the trial court that under applicable law he reported the income involved in the seven items substantially correctly. Because of the complicated nature of the transactions involved, it will suffice for the purpose of this petition to discuss in brief detail only two of the typical items upon which the Government laid great stress during the trial: the so-called Feld Commissions and the Ashworth Note.

(1) *Feld Commissions.* With respect to the so-called Feld Commissions, the trial judge refused to instruct at all, assigning as his reason for this failure "I never said anything about the Feld matters and I don't intend to. They are much too complicated". (R. 686). *However, he did not withdraw from the jury's consideration this item which may have been the sole basis for the verdict.*

The so-called commissions were paid by Feld directly to petitioner and calculated as a percentage of the purchase price of materials purchased by Feld from the Mill for which petitioner operated a proprietary selling agency. Normally, these payments would have been deposited in the proprietorship account and reported as income. In this instance, petitioner deposited the checks received in his personal account, disclosed fully by his check book. (R. 305-311, 354-357, 384-385). Petitioner treated these funds as reimbursements rather than receipts. The proprietorship deducted expenses paid by check. The Record reflects that the petitioner consistently made cash out-of-pocket expendi-

tures on account of the proprietorship and considered these to be equal to or greater than the reimbursements in the form of the Feld checks. (R. 311-313).

The petitioner contended in the Courts below that his treatment of the Feld item did not result in understatement, but that, in any event, the District Court was required to instruct the jury as to applicable principles of tax law before any inference of fraud could validly be drawn.

(2) *Ashworth Note.* The trial judge briefly commented upon this item, but did not instruct as to the applicable principles of the tax law. It is not clear whether the trial judge intended to rule that the item was incorrectly reported as a matter of law when he stated "the fact that Mr. Gaunt was only entitled to a deduction of a few dollars, if anything, does not show by itself that he intended to defraud or defeat or evade the tax. The question is what was Mr. Gaunt's mental attitude". (R. 679).

The record discloses that in 1929 petitioner found it necessary for the welfare of the corporation to surrender part of his paid-up stock in the corporation in which he was a principal stockholder to Ashworth, who in turn agreed to contribute his experience and $25,000 to the corporation. These contributions would have enabled the corporation to make a necessary addition to its operations. As the record reflects (R. 437):

> "The Court: I understand your testimony is that you gave him the stock and he gave the company a note, the company gave him nothing, but the consideration, if anything, was from you personally?
> "The Witness: Correct."

Ashworth failed to contribute the $25,000 and instead delivered to the corporation a promissory note in the amount of $25,000.00, the cost price of the stock to petitioner. In return for his stock, petitioner did not receive any tangible or definite consideration of determinative value. In 1930, the Receiver for the corporation sold the "Ashworth note"

together with certain other assets for $1,000.00 to the petitioner. At a later date, petitioner sued Ashworth on the note and recovered a judgment for the face value and interest in the total amount of approximately $36,000. The judgment was finally compromised with Ashworth for $1,325. (R. 323-328, 436-440), and the petitioner treated the difference as a deductible business loss.

As with the Feld and other transactions, the petitioner contended in the lower courts that his treatment of the Ashworth judgment was correct under applicable principles of tax law, but that, in any case, no inference could be drawn from any attempt to reduce taxes by claiming a deduction honestly but erroneously believed to be legally permissible and that it was incumbent on the District Court to instruct the jury fully as to applicable tax law to enable the jury competently to ascertain petitioner's state of mind. The trial judge refused any such instructions. *However, he did not withdraw from the jury's consideration this item, which may have been the sole basis for the conviction.*

At the close of the government's case the defendant moved to dismiss the indictment, which motion was denied (R. 9, 214). The defendant also moved for an acquittal, contending that no proof of wilfulness was shown. The defendant further contended as to counts 1, 2 and 3 that in any event the offense defined in Internal Revenue Code, Section 145 (b), could not be made out without proof of some fraudulent act or concealment beyond the filing of a false return. The defendant further contended as to count 5 that 18 U. S. C. § 80 had been repealed by the enactment in 1942 of Internal Revenue Code, Section 145 (c), so far as the latter statute was applicable. The trial judge was of the opinion, and the prosecuting attorney conceded, that no fraud was shown outside of the filing of the return (R. 213-214), but disagreed with the defendant's construction of Section 145 (b) (R. 215-216). The trial judge rejected the defendant's contention on count 5, believing the point to be concluded by the decision of this court in *United States* v.

Gilliland, 312 U. S. 86, 95, although he doubted the correctness of this court's decision (R. 214-215). The court denied the motion for acquittal (R. 9, 214).

The defendant presented requests for instructions, many of which were denied by the court.[1] The instructions denied included those numbered 23-29 and 32 (R. 14-16), framed to assert the defendant's contention that some affirmative act calculated to mislead or conceal in addition to an incorrect return of income was necessary to make out the offense defined in Internal Revenue Code, Section 145 (b), and the court instructed the jury to the contrary (R. 682). Indeed the District Court evinced strong doubt of the propriety of its refusal to accept petitioner's requested instructions based upon the *Spies* case.

> Mr. Garrity. I understand a wilful under payment of tax, in itself, under the *Spies* case, does not constitute a violation of 145b. Nevertheless I do think that the *Spies* case holds precisely that a wilful understatement on a return which is filed, is such an act which would support a conviction under Section 145b.
>
> The Court. Do you press me to charge that?
>
> Mr. Garrity. Yes, your Honor.
>
> The Court. I probably will. I didn't know whether you would press it in view of the fact that in this case you don't have to go that far, and there is no Supreme Court case on the point. You are just running the risk that I may be wrong by following your request.
>
> Mr. Garrity. I do press you on the point, your Honor, because I think those cases so provide, and that they are the law, and a correct statement of the law.
>
> The Court. All right, I will do it. You are warned, Mr. Bradford, that I am going to go as far as the Government requests.

The instructions denied also included those numbered 20, 21, 22, 33, 40 and 41 (R. 13-17), setting forth the defendant's contentions as to the principles of income tax law

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[1] Requests numbered 7, 9, 11, 13, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 40 and 41.

applicable to those transactions in which he disputed the government's contention that he had understated his net income. The defendant duly saved his exceptions (R. 685-686). The trial court not only refused to give the instructions requested as to the principles of income tax law applicable but refused for the most part to instruct at all as to the principles of income tax law which the defendant was supposed to have violated.

The jury acquitted the defendant on count 1 and convicted him under counts 2, 3 and 5. Motions in arrest of judgment and for new trial were presented and denied after the verdict (R. 18, 19, 688-689).

The District Court sentenced the defendant to eighteen months' imprisonment on each count, to run concurrently, and fines of $2000 on each count, to be cumulative.

The Court of Appeals modified the judgment by eliminating the fine under count 5 and affirmed the judgment as so modified. The defendant presented a petition for rehearing and motion to modify the judgment, and this petition and motion were denied by the Court of Appeals (R. 918).

REASONS FOR GRANTING THE WRIT.

I.

Conflict and Confusion As to Proper Interpretation of *Spies* v. *United States*, 317 U. S. 492.

Since the decision of this Court in *Spies* v. *United States*, supra, nothing but confusion has prevailed as to the meaning of that decision. The confusion has now been compounded by the Court below to the point where it is imperative that this Court restate the applicable principles of tax law if the Congressional scheme of enforcement is not to be reduced to a meaningless jumble of multiple penalties, and if every taxpayer in the country is not to be subjected to the jeopardy of committing a felony every time he makes an error on his return.

In the *Spies case,* this Court determined that Congress had embodied in the Internal Revenue Code a complete enforcement scheme designed to reach every degree of delinquency. The Court elaborated upon distinctions between the various penalties and crimes set out in the revenue laws, and, in particular undertook to segregate the misdemeanors from the felonies defined in those laws, 317 U. S. 492, 497-99:

> A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws. But it would be unusual and we would not readily assume that Congress by the felony defined in § 145(b) meant no more than the same derelictions it had just defined in § 145(a) as a misdemeanor. Such an interpretation becomes even more difficult to accept when we consider this felony as the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency. * * *
>
> The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term "attempt," as used in the felony subsection. * * *
>
> We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.
>
> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner". By way of illustration, and not by way of limitation, we would think affirmative willful attempts may

> be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transaction of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

If the *Spies* decision is to be taken to mean what it plainly imports, some affirmative act of concealment, in addition to the concealment that naturally results from the false return, is essential to the establishment of a felony. This would also seem to be the teaching of this Court's subsequent decision in *United States* v. *Johnson*, 319 U. S. 503, 514-15:

> In short, the Circuit Court of Appeals read the substantive counts as though they charged Johnson merely with the filing of false returns on March 15th. That may only be a misdemeanor under § 145(a) of the Internal Revenue Code, but that is not the offense with which Johnson was charged. He was charged with a felony made so by § 145(b), the much more comprehensive violation of attempting "in any manner to defeat and evade" the payment of an income tax. The false return filed on March 15th was only one aspect of what was a process of tax evasion.

In one of the first lower court decisions after the *Spies* and *Johnson* cases, the Court of Appeals for the Ninth Circuit in *Maxfield* v. *United States*, 152 F 2d 593 (C. A. 9, 1945), literally applied the interpretation of the *Spies* case contended for here in finding positive acts of concealment of the type illustrated in the *Spies* case, such as "that the appellants planned to keep two sets of books—one for exhibition purposes only" (152 F 2d 593, 597).

In contradistinction, however, to the Ninth Circuit's interpretation of the *Spies* decision, the Court of Appeals for

the Eighth Circuit in *Cave* v. *United States,* 159 F 2d 464, 467 (C. A. 8, 1947); cert. den. 331 U. S. 847, held:

> That the evidence justified a finding by the jury that appellant's income tax returns filed by him for the years 1943 and 1944 were deliberately false and fraudulent is not controverted. * * * The government was not required to prove more than that there was willfully unreported income to sustain a conviction under § 145(b).

This holding was not mischievous on the facts of the *Cave* case, because the District Court, as indicated in the Petition for Certiorari in this Court, had instructed the jury, in strict accordance with the *Spies* case, of the necessity for an additional affirmative act over and above the act of filing a false return:

> You are instructed that the mere filing of a false or fraudulent return or the wilful failure to pay an income tax due or the wilful failure to make a return or to keep records or to supply information are not of themselves sufficient to find defendant guilty as charged in this indictment, but it is incumbent on the Government to go further and show that the defendant committed some wilful act the likely effect of which would be to mislead or conceal from the taxing officers the amount of income upon which the tax is levied, and if the Government fails to prove such additional wilful act, the defendant should be acquitted.

Despite the District Court's literal following of the *Spies case,* the Court of Appeals decision in the *Cave* case has been widely cited as authority for the proposition that no affirmative act in addition to the act of filing a false return is necessary to establish the felony denounced in 145(b) I. R. C. *Myres* v. *United States,* 174 F 2d 329 (C. A. 8, 1949); *United States* v. *Croessant,* 178 F 2d 96 (C. A. 3, 1949); *United States* v. *Pennell,* 178 F 2d 98 (C. A. 3, 1949).

The conflict and confusion prevailing in the lower courts as to the proper interpretation of the *Spies* case is graphi-

cally illustrated by the incredible results reached by various lower courts in relating § 145(b) to § 145(c). For example, in the instant case, the Court of Appeals, for the First Circuit, distinguished the two sections on the ground that understatement of income was essential for 145(b) but not for 145(c), a view which is directly contrary to the holding in *United States* v. *Koppelman,* 61 F. Supp. 1007 (D. C. Pa. 1945). To further confuse the question, the Ninth Circuit in *Taylor* v. *United States,* 179 F. (2nd) 640 (C. A. 9, 1950), thought the two sections were distinguishable on the ground that the filing of a return was not essential to the offense under 145(c) which was complete in the mere "*making and subscribing a false return*". Under the *Taylor* doctrine, a taxpayer can commit a felony by making and subscribing a return which he never files with anyone, but should he file a return he automatically becomes liable under § 145(b),

The sharp departure by several of the Courts of Appeal from the doctrine announced in the *Spies* case has now culminated in the decision of the Court below, where the First Circuit held that a taxpayer could be found guilty of the felony defined in 145(b) if the jury found (R. 684) "that the defendant was an intelligent, astute and successful business executive with many years of experience who had full records of his income available, and that the understatements in his returns for the years involved which he made out himself, were gross".

The view of the law entertained by the First Circuit is substantially that of the United States, which has announced its intention of treating "as a possible means of attempted evasion, the inherently affirmative action involved in the filing of a false and fraudulent return". See Brief of United States in opposition to Petition for Certiorari, *Cave* v. *United States,* supra. Indeed, in a recent address,[1] the Assistant Attorney General of the United

[1] "How the Department of Justice Operates in Income Tax Fraud cases," 87 Journal of Accountancy No. 3, March 1949.

States in charge of the Tax Division of the Department of Justice recognized that petitioner's interpretation of the *Spies* case was widely held, but rejected the contention that the mere filing of a false return is not sufficient to constitute a violation of 145(b):

> The contention, briefly, is this: that even where the taxpayer has filed a factually false return grossly understating his net income, his Government cannot prosecute under Section 145(b), unless, in addition to proof of additional net income and the filing of a false return, the Government can show that the taxpayer committed *other* wilful acts of commission, such as the acts which the Supreme Court enumerated in the excerpts from the *Spies* case which I have just quoted.
>
> In our view, this is, of course, an amazing contention, completely unwarranted and involving a patent misconstruction of the *Spies* decision. The basic fallacy in that contention is simple: it completely ignores and disregards the fact, as shown in scores of reported criminal tax cases, that the most obvious and frequent means of attempting to evade and defeat a tax is by the filing of a return which is in fact false and fraudulent. (Citing *Cave* v. *United States*, supra).

In view of the announced policy of the United States and in view of the confusion prevailing in the lower courts as to the correct interpretation of the *Spies* case, it is of paramount importance to the taxpayer involved here as well as to the orderly administration of justice that this Court now undertake to clarify the meaning of its decision in the *Spies* case.

II.

Departure From *Spies* Doctrine Thwarts Congressional Scheme of Enforcement.

A cursory glance at the Internal Revenue Code indicates the Congressional intent to establish a complete enforcement scheme designed to attach penalties of varying severity to derelictions of varying gravity. The Code pro-

vides the following penalties: the payment of simple interest together with any deficiency resulting from mere understatement, § 292(a); the deficiency, plus interest, plus 5% of the deficiency for simple negligence, § 293(a); the deficiency, plus interest, plus 5 to 25% for "wilful neglect", § 291(a); the deficiency, plus interest, plus 50% of the deficiency where the deficiency is due to fraud with intent to evade the tax, § 293(b); and in conjunction with the foregoing civil penalties, fines and imprisonment for the misdemeanor of filing a "false or fraudulent return" "with intent to defeat or evade" any tax, § 3616(a); fine and imprisonment for the misdemeanor of wilfully failing to make a return or pay a tax due, § 145(a); or, fine and imprisonment for the felony of wilfully attempting "in any manner to evade or defeat any tax", § 145(b); fine and imprisonment for the felony of wilfully making and subscribing a return which is known not to be correct as to every material matter, § 145(c).

In the foregoing sections, the Congress, as this Court held in the *Spies* case, clearly intended to establish a scheme of enforcement that would undertake to distinguish each "degree of dereliction". To contend that the mere filing of an incorrect return is sufficient to establish the felony denounced in 145(b) is to eradicate any possible distinction between the misdemeanors and the felonies defined in the Code and to let the prosecution of a taxpayer depend entirely upon the caprice of an enforcement officer.

As an illustration of the arbitrary results flowing from such unbridled discretion in the hands of enforcement authorities, compare the case of *Halle,* who suffered only a civil penalty where the Court found that "The irresistible inference from the facts in this record is that the petitioner intended his returns to be false and fraudulent, to evade the tax lawfully due" (*Halle* v. *Commissioner,* 7 T. C. 245, aff. 175 F. (2d) 500, (C. A. 2, 1949) with the case of Guant, who suffered the ultimate sanction where the Court below found only that the petitioner was an

intelligent, astute, and successful business executive, with many years of experience who had full records of his income available, and that the understatements in his returns for the years involved, which he made out, himself, were gross." (R. 684).

Such arbitrary results necessarily rob the various penal sections of the Code of any semblance of independent vitality and thus do violence to the Congressional intent. Such a result so offends ordinarily accepted notions of due process as to require this Court now to re-define the Congressional intent embodied in the pertinent sections of the revenue laws:

III.

Welfare of Taxpayers Demands Protection Against Arbitrary Enforcement of Tax Sanctions.

The contention that a mere filing of a false return constitutes a felony under the Internal Revenue Code threatens the gravest consequences for every taxpayer in the country, because at one time or another, nearly every taxpayer, large and small, fails to include in his return some receipt which, rightly or wrongly, he honestly believes to be non-taxable. For example, the taxpayer here may well have been convicted for failing to report the so-called Feld commissions, which he asserted, without contradiction in the face of the record, to be reimbursements of out-of-pocket expenses incurred in the course of business. And yet it would never occur to the vast majority of Government employees that they must include per diem allowances in their gross income if they wish to avoid indictment for a felony under the doctrine contended for by the United States. Such an intolerable hazard is certainly not in accordance with the Congressional intent and should not be permitted by this Court to continue. A recent symposium of the Section of Taxation, American Bar Association, demonstrated how widespread was the concern

entertained generally by members of the Bar over the tax enforcement policies pursued by the United States.[1]

IV.

Due Process Requires Trial Court Instruct Jury on Applicable Principles of Tax Law.

The trial court refused to instruct the jury as to the principles of income tax law applicable to four of the principal transactions in issue. His actions and the reasons given by him and by the Court of Appeals in sustaining him are extraordinary and involve a departure from elementary principles governing respective duties of judge and jury. The error was so fundamental and so serious as to deprive the defendant of one element of his constitutional right to trial by jury.

The trial judge explained that he wished to avoid any instructions on items as to which the law was "doubtful" (R. 644) or the subject of "dispute" (R. 678) or which presented "complicated problems of law, as to which the parties would not be in complete agreement" (R. 679-680), or were "too complicated" (R. 686). In affirming, the Court of Appeals held only that a jury with a correct understanding of the tax law might have convicted the defendant, which is impertinent to the question here as to whether the jury in fact had a correct understanding of the tax law involved. In the instant case, it is quite possible that the jury convicted the petitioner on some misunderstanding of the income tax law.

It is necessary that the jury be instructed as to applicable principles of tax law so that the jury may competently decide whether the taxpayer's transaction did or did not require him to treat the income therefrom as taxable; and even if the item in question should be found to

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[1] Proceedings, American Bar Association, Section of Taxation, Symposium on Procedure in Tax Fraud Cases, September 19, 1950.

represent taxable income, the instructions are still necessary to enable the jury competently to determine whether taxpayer's treatment of the transactions involved was so unreasonable as to warrant an inference of bad faith.

If petit juries are to continue to play an important role in the enforcement of our tax laws, it remains for this court to declare that they must be furnished with sufficient guidance as to the applicability of the laws they are applying to enable them intelligently to discharge their function in the scheme of enforcement.

Respectfully submitted,

ROBERT F. BRADFORD,
WILLIAM L. MCGOVERN,
JOHN A. PERKINS,
BERT B. RAND.

Of Counsel:
ALBERT J. AHERN.

STATUTES INVOLVED.

Sec. 145. PENALTIES.

(a) Failure to File Returns, Submit Information, or Pay Estimated Tax or Tax.—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code. (Effective after August 27, 1949, Code Sec. 145 (c) is repealed by Sec. 4 (b), (c) of P. L. 271, 81st Cong.)

Sec. 291. FAILURE TO FILE RETURN.

(a) In case of any failure to make and file return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days with an additional 5 per centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3612 (d) (1).

Sec. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

(a) *Negligence*—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272 (i), relating to the prorating of a deficiency, and of section 292, relating to interest on deficiencies, shall not be applicable.

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

Sec. 3616. PENALTIES.

Whenever any person—

(*a*) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made, he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

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No. 397

Supreme Court of the United States.

OCTOBER TERM, 1950.

ALFRED C. GAUNT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

ROBERT F. BRADFORD,
JOHN A. PERKINS,
WILLIAM L. McGOVERN,
BERT B. RAND,
Counsel for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1950.

ALFRED C. GAUNT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.*

Opinions Below.

The opinions of the District Court and of the Court of Appeals have not been officially reported (see R. 214, 895).

Argument.

I. THE FAILURE OF THE TRIAL COURT TO INSTRUCT AS TO THE TAX LAW, WHICH THE DEFENDANT IS ALLEGED TO HAVE VIOLATED.

(*a*) *What happened in the trial court.*

The government's case was built largely around the defendant's handling of seven principal transactions. One of these is not now of any concern, as it was involved only

*For statement of jurisdiction, statement of the case and specification of errors, see corresponding sections in the petition.

under count 1, upon which the defendant was acquitted. Of the remaining six the defendant in the course of the trial conceded his error on three, and no contention is now made that the defendant was prejudiced by the failure of the trial court to instruct as to the tax law applicable to those transactions. There were three transactions, however, on which the defendant contested the contentions of the government as to whether the items in question were taxable income or proper deductions. These three transactions were the Feld commissions, the contingent account and the loss on the Ashworth judgment. These are considered separately.

Feld Commissions. The testimony relating to these transactions is found at pages 31-41, 301-313, 354-357, 363-365, 384-385, 525, 557-563, 567, 603-604. The transactions arose out of a conversation between the defendant and Mr. Feld in the latter part of 1942. According to the defendant this conversation was as follows:

> "He said, 'Alfred, can't you get me more goods, some way, somewhere'. . . . I said, 'Everybody, Hyman, is asking for goods the same way'. He said, 'I could use some of your government rejects for women's wear. You sell them to jobbers, anyway, and if you will sell them to me, I will give you a finder's fee for selling them to me'. . . . I said, 'Will that affect the ceiling price'? He said, 'No'. He says, 'The jobber's margin is .875 or 12½%, anyway'. . . . And he said, 'The finder's fee that I will give you if you will let me have these goods will be 4½%. . . . 4½% of the amount of the face of the invoice of goods which you may ship me. And I will not resell the goods at higher than ceiling price'. . . . I said, 'All right, Hyman, we will try and find you some goods'." (R. 304-305.)

The defendant freely conceded that he received the sums in question and, in fact, was paid by check and entered the payments in his check book (R. 305-311, 354-357, 384-385). The defendant freely conceded also that the payments received were taxable income. With one minor exception (R. 558-559), he did not include these items on his tax returns or his work sheets. The defendant's explanation for his treatment of the Feld commissions is as follows:

> "The very reason that I had these [the Feld checks] made to me personally, that I was using these to reimburse me for my out-of-pocket cash expense for sales promotion and traveling and customer entertainment and other things that otherwise I would have to set up as a deductible expense. Q. How did you arrive at the figure of the Feld payment used for this purpose? A. Well, my travel expense, recorded expense through my check book of my railroad tickets and my hotels, and so on, were pretty much a matter of record, but I was spending out my cash pocket all the time. I was constantly short an average of $400 or $500 a month, an average of $100 a week for entertaining customers, for various expenses in connection with the business, and I used the proceeds of the Feld checks to reimburse me for these out-of-pocket cash expenses. . . . I deliberately distributed [i.e., attributed] these to repaying and reimbursing me for that out-of-pocket expense. . . . I included them in my work sheet neither as a receipt nor as an expenditure. . . . For the reason that one hand washed the other and it would be a deductible expense in any event." (R. 311-313.)

Whether or not the defendant should have reported the receipts as income and also the expenditures as a deduc-

tion, he was perfectly correct in his understanding that they would cancel each other out, and no difference in the amount of tax would result from his failure to enter both items on the return.

The defendant requested an instruction, No. 20 (R. 13), relating to the right of a taxpayer to deduct all the ordinary necessary expenses paid or incurred during the taxable year in carrying on any trade or business. The trial judge stated that he agreed with the instruction (R. 644), and the only reason he assigned for failing to give it was: "I never said anything about the Feld matters and I don't intend to. They are much too complicated" (R. 686).

The result of this course of procedure was that the jury were left without instruction as to the taxability of the Feld commissions or the deductibility of the expenses for which the defendant claimed to have reimbursed himself out of the Feld commissions or the proper reporting of them.

Contingent Account. The testimony with reference to the transactions comprising the contingent account is found at pages 123-124, 145, 279-283, 329-350, 379-380, 410, 454-472, 473-516, 588-592, 604-605 and 607-608 of the record. The so-called contingent account was based upon a memorandum of agreement between Merrimac Mills Company of which the defendant was a principal stockholder and active officer (R. 217-227), and the defendant, dated July 1, 1942 (Exhibit F, R. 280, *post* 699). By that agreement Merrimac Mills Company acknowledged that it was indebted to Alfred C. Gaunt in the amount of $58,227.17—

> "on however a contingent basis, to be paid when as and if payment of Sales Commissions is resumed to Alfred C. Gaunt & Co. by Merrimac Mills Co.
>
> "Payment of such sales commissions shall be attributed to the reduction of this debt by application of

whatever may be denoted by Alfred C. Gaunt from time to time of moneys so received by Alfred C. Gaunt & Co.

"Merrimac Mills Co. rate of payment to Alfred C. Gaunt & Co. shall at no time be more than the normal rate of 5% on Civilian sales and 2% on Government sales; nor shall this be a liability of Merrimac Mills Co. except as a part of such Commissions and contingent thereon. It is therefore not set up as a direct liability on the books of Merrimac Mills Co."

The defendant's understanding of the tax law applicable to this transaction was essentially correct. Thus, in cross-examination he testified as follows:

"Q. You received income then which you did not report in those years by reason of deductions based on this memorandum of agreement? . . . A. No, that wasn't income. That was in payment of the debt. Q. So that they were amounts received by you which you didn't consider income? A. That is right. Q. You considered them non-taxable amounts received by you? A. In payment of the debt, yes." (R. 471; see also R. 329-330.)

In this respect, even the failure to report the total receipts on the tax return and to report a deduction for the amount of the contingent account was correct, for the contingent account was not properly a deduction, but rather non-taxable income which should be excluded.

It is true that the defendant did not regard the debt as a legal debt of Merrimac Mills Company in the usual sense, but a moral or contingent debt only (R. 605). The fact that the debt was a moral or contingent debt only does not render the payments received taxable to the defendant.

This is only the converse of the well-settled principle that the payment of a moral obligation may be a proper deduction.

Herschel v. *Jones,* 1 B.T.A. 1226 (1925).
Abraham Greenspon, 8 T.C. 431 (1947).
Gilt Edge Textile Corporation, 9 T.C. 543 (1947).
L. Heller & Son, Inc., 12 T.C. 1109 (1949).
H. Hamburger Co., Inc., 8 T.C.M. 780 (1949).

This being so, there is no reason why the receipt of payment of a moral obligation should not be held to be non-taxable. Since Merrimac Mills Company was morally obligated to the defendant in a substantial amount, and was making substantial payments to the defendant, there seems to be no good reason why the payments should not be treated as being made in discharge of the moral obligation, for otherwise the defendant is required to suffer the losses which gave rise to the moral obligation without tax benefit. This was the defendant's understanding. On cross-examination he testified as follows:

> "Q. Was the purpose of this contingent fund agreement a device to enable you to conceal any money you received in any subsequent years? A. Certainly not. Q. What was the purpose of it? A. I didn't want to pay taxes on losses, and these were losses, and I certainly wouldn't want to pay taxes on losses." (R. 479.)

The defendant later amended the agreement of July 1, 1942 (R. 470). This was apparently "somewhere around November 1944" (R. 475) and is shown on a copy of the agreement admitted in evidence as Exhibit 54 (R. 474, *post* 699). By this amendment the defendant added $716.34 to the previous total of $58,227.17, making a total of $58,943.51. As previously stated, the agreement of July 1, 1942, provided that "payment of such sales commissions

shall be attributed to the reduction of this debt by application of whatever may be denoted by Alfred C. Gaunt from time to time of moneys so received by Alfred C. Gaunt & Co." This was done as follows:

1942	$3,908.22
1943	6,000.00
1944	6,750.00
1945	7,000.00
1946	35,285.29

(R. 469; Exhibit 54, R. 474, *post* 699.) The defendant's explanation of the basis on which this schedule of reduction of the debt was adopted appears at pages 282, 349, 380 and 514-515 of the record.

The items in the agreement of July 1, 1942, fall into one of three classes:

(*a*) "Foregone and cancelled back salary as shown by minute books of Merrimac Mills Company," $20,000.

(*b*) Amounts "contributed in stock to Merrimac Mills Company as shown by books of the corporation," $13,075.

(*c*) Debts of Merrimac Mills, Inc., from 1931 to date, "paid or assumed" by Alfred C. Gaunt, "which made possible formation of new company on favorable basis," $25,152.17. To this latter category was later added another item as previously stated.

The item of foregone and cancelled back salary was explained by the defendant at pages 331-334 of the record. The two items of contributions of stock was explained by the defendant at pages 334-339 and 485-492 of the record. The items in the category of paid or assumed debts of Merrimac Mills, Inc., a predecessor corporation to Merrimac Mills Company, aggregated $25,152.17 as listed in

the agreement of July 1, 1942. To this was later added a further item of $716.34, making a total of $25,868.51, for which the tax benefit was taken by the defendant. Of this total, $2184.16 had been paid by the defendant before making the agreement of July 1, 1942; $22,368.35 was paid after the making of that agreement and before the time of the trial; and $1316 still remained to be paid at the time of the trial. The evidence relating to these items and the dates and amounts of payments are set forth in a tabulation in the defendant's brief in the Court of Appeals and will be set forth in the defendant's brief in this case if certiorari is granted.

The obligation to pay the debts was assumed at a much earlier time. Testimony as to the assumption of particular items appears at pages 465-466, 493-494, 501, and 502-504 of the record. In the case of the Barrington loan, documentary proof of the assumption was offered in the form of a letter from the defendant to Barrington dated June 9, 1932 (Exhibit R. 8, R. 347, *post* 699).

The defendant requested instructions numbered 40 (note correction made orally at R. 647) and 41 (R. 17), concerned with questions raised by the contingent account. At the conference at the bench on the requests for instructions the court stated that he agreed with number 40, but would not give number 41 (R. 647). In his charge the court instructed the jury that, so far as payment of the contingent account was a payment of back salary, that is, as to the first item of $20,000 contained in it, it should have been reported for taxation (R. 680). As to the balance of the account, the court's only comment was as follows:

> "Now, I am very reluctant to get into a discussion of the contingent account, which appears in the 1944, 1945 and 1946 income tax accounting on the sheets, G-2, J-2, and T-2. I don't want to get into them be-

cause they present complicated problems of law, as to which I think the parties would not be in complete agreement. But I think I can say one or two things which will not be the subject of disagreement." (R. 679-680.)

Here again, therefore, the jury were left without instruction as to the law which the defendant was charged with violating.

Loss on Ashworth Judgment. In his computations for his 1945 income tax return the defendant took a deduction in the amount of $36,470.60 as the loss on a judgment which was settled in that year for a fraction of its face amount. The evidence relating to this transaction appears at pages 323-328, 350-352, 423-442, 523-524, 578-579, and 600-601 of the record.

The defendant obtained a judgment against one Asa Ashworth on March 31, 1939, in the amount of $37,795.50 (R. 327; Exhibit I, R. 326). After extended efforts to collect the judgment the defendant settled his claim on the judgment for $1325, and an agreement of mutual release between the defendant and Ashworth was made on December 18, 1945 (R. 327-328; Exhibit K, R. 328). The deduction claimed by the defendant in computing his 1945 tax return was the difference between the face amount of the judgment and the amount of the settlement (R. 328).

In the defendant's mind, affected no doubt by the opinion of his attorney (R. 350-352, 600-601), the item was deductible as "a bad debt" (R. 438). The government contended that the settlement was in effect the sale of a capital asset, upon which the defendant realized a capital gain or loss according to his basis (R. 438).

In 1928 or 1929 Merrimac Mills, Inc., decided to establish a spinning mill. The corporation engaged Ashworth to get it going on the agreement that he would furnish $25,000 in

cash and would receive from the defendant $25,000 of his personal stock in the corporation. The defendant turned over "$25,000 worth" (R. 324) in stock, but Ashworth did not pay the cash to the corporation. He subsequently gave a note to the corporation for $25,000 (R. 323-325, 423-437). The corporation went into receivership in 1931 (R. 220-223). There was no evidence that the defendant intended to give up what he regarded as $25,000 worth of stock without acquiring a right of some kind against somebody in the transaction.

On the defendant's testimony it is clear that he understood that he did acquire a right of some kind against someone. No doubt the defendant looked in the first instance to the corporation for reimbursement at some time if the corporation received payment of the $25,000 owed it by Ashworth, and if the corporation did not receive payment of the note, then the defendant should in some way be subrogated to the corporation's right on the note. Or, from Ashworth's point of view, his obligation was to the corporation primarily, but to Gaunt secondarily in the event of such subrogation. This legal elaboration is a construction from the evidence, but it seems to be required by the following testimony of the defendant:

> "Q. Will you explain to us what this item listed as 'Ashworth' was? A. Ashworth was a man that I think I testified about who owed us $25,000 on a note. The Court. You said 'owed us.' Who do you mean by 'us'? The Witness. Your Honor, he owed the Merrimac Mills primarily, and he owed me secondarily because I gave him $25,000 of my personal stock, so he owed for or paid the total of $25,000." (R. 323.)

The defendant, although previously having rights in the note, as explained, became holder of the note according to

its tenor by acquiring it along with the other assets of Merrimac Mills, Inc., in the hands of the receiver at the receiver's sale in 1935 or 1936. He paid an aggregate price of $1000 for the assets in the hands of the receiver (R. 325-326, 436-437, 441-442). The defendant steadfastly refused to concede that he had no rights prior to the acquisition of the note at the receiver's sale (R. 441-442).

There was no evidence that the involved legal situation according to which the propriety of the deduction should be judged as a matter of law was in the defendant's mind at the time he made his return in January, 1946. But one thing, no doubt, was in his mind, and that was that he had actually suffered the loss. Thus the defendant testified:

> "Q. What did that judgment cost you? A. It cost me 250 shares of stock and $1,000. Q. How much did you value the total cost, including the value of the 250 shares of stock? A. I valued it at $25,000 at the time, and $36,000 when I got the judgment." (R. 578.)

This factual situation, which was not disputed, presented a tax problem of considerable difficulty. The defendant requested instructions numbered 22 and 33 (R. 14-16), dealing with the deductibility of a bad debt, both of which related to the Ashworth judgment. In the conference at the bench before the court's charge, the court indicated that he agreed with both instructions (R. 645, 647), but did not indicate whether he would give them. In his charge the court said:

> "I pass from the double deductions to the problem of the Ashworth note, about which I intend to say much less than might be said as a matter of law, but I want to confine myself to a point as to which I hope there is no dispute." (R. 678.)

The court then went on to state some of the facts of the transaction without, however, at any point stating the applicable tax law. He did not say whether or not all or any part of the deduction was lawful. However, in instructing on the question intent, the court said:

> "The fact that Mr. Gaunt was only entitled to a deduction of a few dollars, if anything, . . ." (R. 679.)

This passing remark, which did not tell the jury what principles of law to apply, is the only phrase in the charge from which the jury could infer the court's view as to the principles of tax law applicable to the Ashworth transaction. Here, therefore, in a third instance the court failed to instruct the jury as to the law which the defendant was said to have violated.

The reasons assigned by the District Court for his failure to instruct on the tax law applicable to the foregoing transactions are extraordinary (see generally R. 644, 649). If the points involved are the subject of dispute between the parties and involve questions of law which are complicated, as the judge asserted, surely there is more need than usual to instruct the jury as to the applicable tax law. The fact that the court finds the legal questions complex was certainly no reason to leave them to a jury which has no legal training.

It is obvious that the jury could not be expected to understand the problems of income tax law presented without instructions from the court. The court was perhaps concerned lest instructions given on doubtful items might add to the jury's confusion. If so, the court could properly have withdrawn from the consideration of the jury those items which the court believed to be doubtful, but the court did not do so.

(*b*) *The failure of the trial court to instruct the jury as to essential elements of the offense charged was error so serious that under the decisions of this court and of the Circuit Courts of Appeals for the Third and Ninth Circuits it would be noticed by the court even if no instructions had been requested and no exceptions saved, as they were.*

In the present case proper request was made for instructions by the court as to the applicable tax law and proper exception saved, but the seriousness of the error of the court in failing to instruct the jury on the point is indicated by the cases holding that, even in the absence of such request and exception, failure to charge on the essential elements of the offense would be ground for upsetting a conviction. In *Screws* v. *United States,* 325 U.S. 91, this court, after holding that the charge did not instruct the jury as to the meaning of the word "willfuly" in Section 20 of the Criminal Code, said at page 107:

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. . . . But there are exceptions to that rule. . . . And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

The problem was discussed at length in a similar case in *Williams* v. *United States,* 131 F. (2d) 21 (App. D.C. 1942), where the court concluded at page 23:

"It can now be clearly seen that to hold this charge sound would be to assume that jurors are wise in the law; that they know the constituent elements of rape, that they know what is an assault with intent to commit rape, that they know the full distinction between the two; that they know the definitions of the lesser offenses embraced; that they know all the circumstances under which a verdict of not guilty is proper; and that they know the proper application of the reasonable doubt criterion. Such an assumption violates the accepted division of functions between judge and jury. It is almost, if not, as important to a defendant to have a jury instructed on the law applicable to his particular case by the judge, who knows the law, as to have a jury of his peers. The latter is supposed to safeguard our institution of fair trial by insuring impartiality. But of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment?"

The present case presents the same issue. It is the defendant's contention that, where an essential element of the offense charged is the violation of some other law or regulation, it is mandatory upon the trial court under the principles cited to instruct the jury as to the law which the defendant is alleged to have violated. This contention is supported by decisions of the Circuit Courts of Appeals for the Third and Ninth Circuits. In *Stein* v. *United States,* 153 F. (2d) 737 (C.C.A. 9, 1946), the defendant was charged with the criminal offense defined in the Second War Powers Act, 50 U.S.C. App. § 633, providing that "any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder,

whether heretofore or hereafter issued, shall be guilty of a misdemeanor, . . .'' The defendant was alleged to have violated an order of the War Production Board. The trial court instructed the jury as to the contents of the order, except that counts 15, 16 and 17 were based on sales made after March 4, 1943, and the trial court had failed to instruct the jury as to the contents of the order in the amended form in which it was applicable to sales made after that date. The court reversed the judgment on those counts saying:

> ''No objection was made to the court or any mention made in relation to this point prior to the motion in arrest of judgment. However, in view of the fact the fact the regulations are numerous and not simple, we feel that the conviction upon these three counts should be reviewed by us in order that justice may be done. The judge correctly instructed in regard to law applying to all of the counts except these three. As to them no instruction covering the governing law was given and for that reason they must be reversed.''

In *United States* v. *Levy,* 153 F. (2d) 995 (C.C.A. 3, 1946), the defendant was indicted under the Emergency Price Control Act, presumably, 50 U.S.C. App. § 925 (b), providing:

> ''Any person who willfully violates any provision of section 4 of this act [50 U.S.C. App. § 904], . . . shall, upon the conviction thereof, be subject to . . .''

fine and imprisonment. The defendant was alleged to have violated Section 904 and also Maximum Price Regulations 193 and 445. The trial court's charge did not describe the offenses charged in the indictment, nor even mention the pertinent provisions of the Emergency Price Control Act

or the Maximum Price Regulations. The court reversed the judgment, saying (pages 998-999):

> "Appellant made no seasonable request for pertinent instructions; nonetheless he claims as error the trial court's failure to define and explain the offense charged . . .
>
> "In the instant case the trial court's instructions to the jury did not contain the text of the applicable statute. They included no definite information as to the offense charged. Neither the provisions of the Price Control Act, the regulations under it, nor the substance of either, ever reached the jury. The court and counsel of both parties were thoroughly acquainted with the law which the defendant was accused of violating, but there is nothing in the record showing that the jury was ever informed as to such prime requisite . . .
>
> "The case appears to have been tried to the jury upon the inadvertent assumption of both court and counsel that if the whiskey was sold above a certain price the sale would be illegal. But the basis of the illegality was never given the jury
>
> "It was error of the highest degree to submit the case to the jury without adequate instructions as to the law allegedly violated by the defendant on trial and impels the reversal of the judgment."

In *United States* v. *Noble,* 155 F. (2d) 315 (C.C.A. 3, 1946), the defendant was charged with the offense defined in the Second War Powers Act by reason of violation of certain ration orders promulgated thereunder. Apparently the only instructions received by the jury as to the elements of the offense were such as might have been inferred from the submission to the jury of the information setting forth

certain facts alleged to be in violation of the statute and the general ration orders. The court held that this was not a sufficient compliance with the principle that the defendant is entitled to have the jury instructed as to the law alleged to have been violated, and reversed the judgment. Here again no instruction had been requested by the defendant at the trial, but the court said at pages 316-317:

> "We think it is self evident that a jury cannot perform its duty of determining the guilt or innocence of a defendant accused of a crime unless they know the essential elements of the crime which he is alleged to have committed. We think it equally self evident that the only appropriate source of that knowledge is a trial judge, whose traditional function has always included that of instructing the jury upon the law."

In *Morris* v. *United States,* 156 F. (2d) 525 (C.C.A. 9, 1946), the defendant was charged with the offense defined in the Emergency Price Control Act by violation of the provisions of the Act and of Maximum Price Regulation 292. The trial court instructed the jury that, if they found certain enumerated facts, they should find the defendant guilty, but did not attempt to explain, define or quote the text of the statute or the regulation. No exception was saved at the trial, but the court, deeming the error serious, reversed the judgment for failure to define the offense. The opinion of the court contains a careful review of the history of the system of jury trial. The case presented a far narrower question than that presented in the present case, for in *Morris* v. *United States* the court, although failing to define the offense, had instructed the jury in his own manner as to the law, whereas in the present case the jury were left without any instruction as to the law which the defendant was alleged to have violated.

The foregoing cases were reviewed and followed in *United States* v. *Pincourt*, 159 F. (2d) 917 (C.C.A. 3, 1947).

The principle that where an essential element of the offense charged is a violation of some other law or regulation the court must instruct the jury as to the law which the defendant is alleged to have violated is further supported by other cases in which, as in the present case, the defendant had requested a proper instruction at the trial. *Corson* v. *United States*, 147 F. (2d) 437 (C.C.A. 9, 1944). *Samuel* v. *United States*, 169 F. (2d) 787 (C.C.A. 9, 1948).

It should be emphasized again that in the present case the defendant did request proper instructions on the applicable rules of tax law. The cases cited indicate that the failure to give such instructions is error of so serious a degree that the judgment should be reversed even if instructions had not been requested, for a jury which does not understand the law which the defendant is alleged to have violated cannot possibly pass judgment on his conduct.

(*c*) *The failure of the trial court to instruct on so fundamental an element of the offense as the principles of income tax law alleged to have been violated deprived the defendant of that element of his constitutional right to trial by jury which requires that the jury determine the defendant's guilt or innocence according to the law as given to them by the court.*

Under Section 2 of Article III of the Constitution and also under the Sixth Amendment to the Constitution the defendant was entitled to a trial by jury. It is well established that the trial by jury guaranteed under the Constitution means not merely that the verdict shall be made by a jury but also that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect to

the facts. This was clearly established in *Capital Traction Co.* v. *Hof*, 174 U.S. 1. This court said at pages 13-14:

> " 'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion."

The court held that the trial by jury provided for before a justice of the peace was not a trial by jury as required by the Seventh Amendment to the Constitution, because

> ". . . The act of 1823, in permitting cases before him to be tried by jury, did not require him to superintend the course of the trial or to instruct the jury in matter of law; nor did it authorize him, upon the return of their verdict, to arrest judgment upon it, or to set it aside, for any cause whatever; but made it his duty to enter judgment upon it forthwith, as a thing of course. A body of men, so free from judicial control, was not a common law jury; nor was a trial by them a trial by jury, within the meaning of the Seventh Amendment to the Constitution." (Page 39.)

It may be noted that in *Capital Traction Co.* v. *Hof* the court was dealing with the right to a trial by jury in civil

cases under the Seventh Amendment of the Constitution, rather than the right of trial by jury in criminal proceedings under Article III and the Sixth Amendment. The same principles are applicable under Article III and the Sixth Amendment, as is made clear by the decision in *Patton* v. *United States,* 281 U.S. 276, 288, where the court with reference to the phrase "trial by jury" in those provisions said:

> "That it means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question. Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous."

It is an essential part of trial by jury that the jury should receive the law from the court and not apply their own notions as to what the law may be. This must be so for two reasons: First, because otherwise the defendant would be denied his right to be convicted only for those acts made criminal by law; second, because otherwise there would be no means on appeal by which the law applied by the jury could be reviewed. The language of Mr. Justice Story quoted with approval by this court in *Sparf and Hansen* v. *United States,* 156 U.S. 51, 74, states the point as well as it has been stated. He said:

> "' . . . I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law. . . . It is the duty of the court to instruct the jury as to the

law and it is the duty of the jury to follow the law as it is laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it, but in case of error there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land, and not by the law as the jury may understand it, or choose, from wantonness or ignorance or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion.' ''

This court in the case cited spoke in similar terms at pages 101-103.

So it is in the present case. It is impossible to determine upon what supposed principles of tax law the jury may have judged the defendant's conduct. There is no means by which this court or any other court can review the legal principles applied by the jury, for they cannot be known. To permit the verdict in this case to stand would be to sanction a procedure by which a jury may determine according to prejudice, suspicion and incorrect principles of law a matter upon which a defendant's liberty depends.

(*d*) *The argument of the Court of Appeals that the defendant did not report any of the transactions in accordance with applicable law and regulations is erroneous, and, even if true, reserves to the court a function which under our jury system is for the jury.*

The first ground assigned by the Court of Appeals for upholding the action of the trial judge was that "the record discloses no basis for the conclusion that the defendant reported any one of the business transactions in question in compliance with applicable tax law or treasury regulations" (R. 903-904).

This statement does not meet the issue, for two reasons: First, it is not for the court but for the jury, acting upon the evidence and under instructions from the court, to decide whether the defendant understated his tax in any particular transaction. Second, without instruction as to the correct principles of tax law, the jury could not properly decide whether the defendant, even if in error, acted fraudulently, for the defendant's manner of treating a transaction, which might have seemed plausible and reasonable to the jury under the correct rules of law, might have seemed implausible to them on their own mistaken view of the law and lead them to conclude the defendant acted fraudulently.

If as applied to the Feld commissions the reason assigned by the Court of Appeals refers only to the failure of the defendant to report both the commissions and the expenses which were alleged to offset them, then it does not go to the root of the matter at all. It was essential that the jury should know whether or not those expenses, if made as the defendant testified, were properly deductible items. If the statement of the Court of Appeals is meant to convey the thought that the defendant was wrong in his understanding that the expenses were properly deductible items, then it is plainly contrary to the statute. As a result of the failure of the court to instruct on this matter, we cannot know by what

supposed legal principles the jury may have judged the defendant's conduct. Not having been instructed to the contrary, the jury, even though believing the defendant's testimony as to the business expenses made by him for which he claimed to have taken reimbursement, may have supposed that those expenses were not properly deductible and have concluded that they did not offset the commissions received and that the defendant in this way had attempted to defeat and evade his tax.

The court's reasoning likewise fails when applied to the contingent account. In this instance, even the failure to report the total receipts from the tax return and to report a deduction for the amount of the contingent account was correct, for the contingent account was not properly a deduction at all, but rather non-taxable income, which should be excluded. We concede that the defendant was in error as to that portion of the contingent account which represented foregone and cancelled back salary. The defendant's understanding of the contingent account generally was that payments attributed to this account were not taxable income because they were in payment of a moral or contingent debt (R. 471, 605). This, although as we say a correct understanding of the applicable tax law for most of the contingent account, was not correct as applied to the $20,000 in foregone and cancelled back salary. The defendant never had paid any tax on this salary because he had never collected it (R. 484). He apparently did not understand that the taxability of payments made to him under the contingent agreement by reason of the Company's outstanding debt under the agreement for back salary depended on whether or not the defendant was on the accrual basis and had previously paid a tax on the salary in the year in which it accrued.

But even as to this portion of the contingent account the ground taken by the Court of Appeals does not meet the

issue. In the first place, it was for the jury, acting under proper instructions from the court, and not for the court itself to determine whether the amounts received in the contingent account were taxable. In the second place, a jury which understood that in general money received in payment of a debt was not taxable income would view the error of the defendant in quite a different light from that in which a jury who supposed that money received in payment of a debt was taxable income would view it. The defendant's manner of treating the transaction, which might be plausible under the correct rules of law, might seem implausible to the jury on their mistaken view and lead them to the conclusion that the defendant acted fraudulently. It is not difficult to point out in this way how the failure to instruct the jury may have prejudiced the defendant, but it should not be necessary. No instruction having been given to the jury as to the rules of tax law, they were free to follow their own notions, which it is idle to attempt to guess and which is beyond the reach of the power of any court to review.

The reasoning of the Court of Appeals falls down again as applied to the loss on the Ashworth judgment. The defendant at the ~~time~~ was entitled to deduct the difference between the face amount of the original note, $25,000, plus the cost of acquisition at the receiver's sale and the amount of the settlement. This is on the theory that the defendant in 1928 or 1929 in effect lent Merrimac Mills, Inc., the use of $25,000 worth of stock, the stock being delivered to Ashworth and Ashworth giving his note to the corporation. By purchase of the note at the receiver's sale in 1935 or 1936 and the obtaining of judgment on the note and subsequent settlement with Ashworth the defendant was able to realize on the loan only the amount received in settlement, $1325. To view the transaction as giving rise only to a capital loss

on an asset purchased at the receiver's sale is to distort the transaction by looking at only a single part of the whole.

But even if this theory is held to be incorrect, the point made by the Court of Appeals does not meet the issue. It is immaterial whether the defendant's views were right or wrong. The jury could not properly determine whether the transaction involved the settlement of a bad debt or the suffering of a capital loss and in either event to what extent the loss was deductible without instructions from the court.

What was the jury's understanding? Did they suppose that the $1000 limitation on the deductibility of capital losses not offset by capital gains was applicable on the theory that the transaction gave rise to a deduction only as a capital loss? Were the jury led by this supposition to the conclusion that the defendant acted fraudulently to evade the $1000 limitation? Did the jury suppose that no deduction was allowable for a loss sustained in the settlement of a bad debt? Did the jury suppose that neither bad debts nor capital losses gave rise to income tax deductions? The jury were not instructed on any of these matters, and it is impossible to determine what principles they may have applied in deciding whether the defendant understated his tax, nor whether the jury may have been led to the conclusion that the defendant acted fraudulently because his manner of treating the transaction may have seemed implausible in the light of the mistaken principles which the jury supposed to be applicable.

It is apparent upon reflection that the decision of the Court of Appeals is in conflict with the decisions of the Circuit Courts of Appeals in the Third and Ninth Circuits cited above at page 14 *et seq.* In none of those cases was it suggested that the fact that in the court's opinion the evidence if believed showed a violation of the law or regulation in question would excuse the failure of the court to in-

struct the jury in the law supposed to have been violated. To the contrary, in *United States* v. *Levy* it had apparently been assumed by court and counsel even at the trial that the act shown was in violation. And in *Morris* v. *United States* the court's opinion on the facts had been given to the jury and was presumably followed by them.

(*e*) *The argument of the Court of Appeals that the defendant's defense at the trial "was not to deny that he illegally understated his taxable net income from those transactions, but that his understatements with respect thereto were not willful" is plainly and palpably contrary to the record.*

This point is presented fully in the defendant's petition to the Court of Appeals for rehearing (R. 909). We submit that the error of the Court of Appeals is so plain, and its conclusion so clearly contrary to the testimony of the defendant, the instructions requested and the understanding of the trial court as indicated by avoiding in his instructions matters which presented too "complicated problems of law" (R. 680) and confining himself to matters which would not be the subject of "disagreement" (R. 680) or "dispute" (R. 678), that we think the court must have denied the petition on the ground that its alternative argument supported its decision upholding the action of the trial court. We state upon our responsibility as counsel that we have never at any stage of the trial or upon appeal conceded to be in error those points which in this brief we contend to have been correct.

II. The Mere Filing of a False Income Tax Return, Even Though with an Intent to Defeat or Evade the Tax, Cannot be a Violation of Internal Revenue Code, Section 145 (b) as the Courts Below Held, but was a Violation of Section 145 (c) only.

(a) What happened in the trial court.

Counts 2 and 3 purported to be based upon Internal Revenue Code, 26 U.S.C. § 145 (b), which provides, so far as material, that

> "Any person . . . who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Internal Revenue Code, 26 U.S.C. § 145 (c), as it was in force at the times in question in this case, provided:

> "Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code."

The penalties provided in Criminal Code, Section 125, were a fine of not more than $2000 and imprisonment of not more than five years. Section 145 (c) was enacted in 1942, apparently to deal with the problem arising from the fact that, with the elimination at that time of the requirement of an oath on income tax returns, the perjury statute would no longer be applicable.

The defendant contended at the trial and before the Court of Appeals that the mere making and subscribing of a false return, even though done willfully and with an intent to evade or defeat the tax, is not an "attempt" to evade or defeat the tax under Internal Revenue Code, Section 145 (b). This contention was presented in several ways: First, upon the argument that counts 2 and 3 of the indictment did not state an offense against the United States, this argument being made upon the defendant's motion to dismiss the counts of the indictment made at the close of the government's case (R. 8) and renewed at the close of all of the evidence (R. 10) and again on the defendant's motion in arrest of judgment (R. 18); second, upon the defendant's motion for acquittal made at the close of the government's case (R. 9) and again at the close of all of the evidence (R. 10) upon the ground that the evidence introduced by the government and also the evidence on the whole case was insufficient to prove an "attempt" within the meaning of Internal Revenue Code, Section 145 (b); third, by the defendant's requested instructions numbered 23-29 and 32 (R. 14-16). The trial court ruled against the defendant's contention in each instance and instructed the jury as follows (R. 681-682):

> "Now, Mr. Foreman and gentlemen, you remember when I read the statute to you, I pointed out by emphasis in my voice that this applied to a person who wilfully attempts 'in any manner' to evade or defeat the tax imposed by the statute. The language doesn't mean quite what it says. If Mr. Gaunt never filed any tax return at all, he couldn't be convicted under this statute. The phrase 'in any manner' means in any affirmative manner, by taking positive action. Now, there are numerous ways in which a man might, by positive action, seek to evade and defeat a tax. But

so far as this particular case is concerned, it seems to me that the matters which are possibly shown by the evidence—and I use the word 'possibly' merely to indicate that I am not taking a view one way or the other the means and manners which are shown, or might be shown, in this case, are: the return of a tax, where the form has some information, and other information is deliberately omitted or understated; or the use, either in the return itself, or in the papers incidental to the preparation of the return, of double deductions which were known to be double deductions, or the use in connection with the return or its preparation of a scheme or plan or intercorporate arrangement which was known by the taxpayer to be other than genuine." (R. 681-682.)

The defendant excepted to the refusal of the court to charge as requested (R. 685-686).

The defendant's argument in this connection was based on the position that, even if some fraud were shown in the making of a false income tax return, no fraud or concealment of any kind was shown in any other respect. It would not be proper in this brief to review the evidence to support the latter statement, for both the trial court and the Court of Appeals took the position that, even if there was no evidence of fraud outside of the filing of a false return, that was sufficient under Internal Revenue Code, Section 145 (b). This is clear not only from the denial of the defendant's motions to dismiss counts 2 and 3 and in arrest of judgment and the refusal to give the instructions requested, but also from the trial court's express instruction to the jury that an attempt under Section 145 (b) may be made out by "the return of a tax, where the form has some information, and other information is de-

liberately omitted or understated; . . .'' (R. 682). The Court of Appeals likewise expressly ruled that

> ''. . . subsection 145 (b) condemns as felonious willful attempts to evade or defeat taxes 'in any manner', and one matter, certainly, is by the willful filing of a return known to be false in some material respect.'' (R. 898.)

The error of the District Court and the Court of Appeals in this respect is especially serious. A showing of some fraud or concealment outside of the return would have satisfied the *Spies* case and also made out the government's case that the defendant acted wilfully with an intent to defeat and evade the tax. Instead, in its absence the Court of Appeals was compelled, not only to ignore the requirement of an ''attempt'' as defined in the *Spies* case, but further to rely on the unsupportable notion that wilfulness might be made out by evidence merely that the defendant ''was an intelligent, astute and successful business executive with many years of experience who had full records of his income available, and that the understatements in his returns for the years involved, which he made out himself, were gross'' (R. 902). Thus the court in departing from the wise standards of the *Spies* case applied to an ''intelligent, astute and successful business man'' different standards of guilt from those applicable to other persons. Instead of requiring the government to show fraud by cogent proof that the defendant knew of the law he claims not to have known or knew of the omission he claims to have made from oversight, the court permits the fraudulent intent to be inferred from speculation founded only on the defendant's general knowledge or experience or the existence of errors of a large amount.

(b) *The decision of the Court of Appeals is in conflict with the decision of this court in Spies* v. *United States, 317 U.S. 492.*

Spies v. *United States* involved the problem of the relation between Section 145 (a) and Section 145 (b). The present case involves the problem of the relation between Section 145 (b) and Section 145 (c). The questions are not the same, but the answer depends upon the same reasoning. Section 145 (a) made the willful failure to pay a tax or make a return where required a misdemeanor. Spies had been indicted and convicted of an attempt to defeat or evade his income tax in violation of Internal Revenue Code, Section 145 (b). He admitted he had sufficient income to place him under a duty to pay a tax and file a return and that he had done neither. The government endeavored to show an intent to evade or defeat the tax. The Supreme Court reversed the conviction, holding in effect that a willful failure to pay a tax due or file a return required was not a violation of Section 145 (b) even though done with an intent to defeat or evade the tax. The court said at pages 497-499:

> "A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws. But it would be unusual and we would not readily assume that Congress by the felony defined in § 145 (b) meant no more than the same derelictions it had just defined in § 145 (a) as a misdemeanor. Such an interpretation becomes even more difficult to accept when we consider this felony as the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income

tax law and to provide a penalty suitable to every degree of delinquency.

. . . . . .

"The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection. . . . We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

"Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

Spies v. *United States* supports the position of the defendant in this case in four ways: First, the court specifically rejected the position that had been taken by several lower courts that a failure to make a return or pay a tax, if with an intent to defeat or evade the tax, was a violation not merely of Section 145 (a), but of Section 145 (b) also. In the present case the District Court and the Court of Appeals took a stand similar to that rejected position, here applied to the situation covered in Section 145 (c). Second, if, as the Court held, the fact that the willful failure to make a return or pay a tax was made a misdemeanor under Section 145 (a) showed a Congressional intent that it should not be punishable under Section 145 (b) although with an intent to evade or defeat the tax, then likewise the fact that the willful making of a false return was subject to a lesser punishment under Section 145 (c) indicates a Congressional intent that it should not be subject to the greater punishment under Section 145 (b), although with an intent to evade or defeat the tax. Third, it defined the word "attempt" in Section 145 (b) as indicating conduct beyond that punishable by other sections of the statute. Fourth, the character of the conduct cited by the court as amounting to an attempt, even though cited by way of illustration and not by way of limitation, is significant. None involves merely conduct punishable by a lesser penalty. All involve concealment of some kind outside of the tax returns themselves.

(*c*) *The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Fifth Circuit in Jones* v. *United States, 164 F. (2d) 398.*

In *Jones* v. *United States* the defendant was indicted and convicted under Internal Revenue Code, Section 145 (b), and the court reversed and remanded for error in the trial

judge's instructions. The income taxes involved were for the years 1942 and 1943. The defendant had filed returns in each year but had not included in the returns certain fees received from the A. A. A. Air Conditioning and Manufacturing Company. The evidence is not set out in the court's opinion. The court said at pages 400-401:

> "In the Spies case, the Supreme Court, pointing out with admirable clarity and correctness the nature of the accusation pressed in this case that the evidence required the established guilt of it, has left in no doubt the right of the defendant so charged to have his defenses clearly and fairly put. Definitely settling that the mere failure to return income and pay the tax on it, though the taxpayer knew that it was due, would not constitute the offense of willfully attempting to defeat and evade the income tax, and stating that something more than this must be shown, the court said: 'By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of ones affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal'. . . .
>
> "It said, too: 'We think a defendant is entitled to a charge which will point out the necessity for such an inference of willful attempt to defeat or evade tax from some proof in the case other than that necessary to make out the misdemeanors; and if the evidence fails to afford such an inference, the defendant should be acquitted.'

> "In the light of these pronouncements, it is quite plain that the theory on which the cause was tried below, that defendant's failure to return the income, knowing that it was due, of itself made out a case which he was required to rebut, was a wholly incorrect one and that the judgment must be reversed and the cause remanded for further and not inconsistent proceedings."

The Court of Appeals below concluded (R. 899) that *Jones* v. *United States* "is not in point for in that case the court ordered a new trial for error in the charge, not dismissal for failure properly to allege a crime." The decision in *Jones* v. *United States* is not distinguishable on this ground, for in our case the same error was made in the charge. Furthermore, it follows from the decision in *Jones* v. *United States* that counts 2 and 3 of the indictment in the present case, alleging, as they do, an attempt "by filing and causing to be filed . . . a false and fraudulent joint income tax return," are insufficient to state the offense defined in Section 145 (b).

(*d*) *The decision of the Court of Appeals below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in Taylor v. United States, 179 F. (2d) 640, as to the relation between Internal Revenue Code, Sections 145 (b) and (c).*

The defendant's argument as to the construction of Internal Revenue Code, Section 145 (b), was based at the trial and before the Court of Appeals largely on the relationship between that section and Section 145 (c). Three different answers have been suggested to the problem of drawing the line between these two sections. One is that

advanced by the defendant; a second is that which seems to have been held by the District Court and the Court of Appeals below, and a third is that advanced by the Court of Appeals for the Ninth Circuit in *Taylor* v. *United States.* The defendant contends that under Section 145 (c) the only fraudulent conduct required is the willful filing of a materially false income tax return, whereas the "attempt" which in an element of the offense under Section 145 (b) requires some concealment or other act beyond the violation of the statutory direction as to the filing of returns, for which other criminal penalties are provided. The argument of the District Court and the Court of Appeals below is that the willful filing of a false return with intent to defeat or evade one's tax is a violation of Section 145 (b) as well as of Section 145 (c), whereas the willful filing of a false return for some other purpose is a violation of Section 145 (c) only. The argument of the Court of Appeals for the Ninth Circuit is that the "making and subscribing" of a false return required under Section 145 (c) is something less than the "filing" of a false return and that the willful making and subscribing of a false return with an intent to defeat or evade the tax is a violation of Section 145 (c) only, whereas the willful filing of a false return with an intent to defeat or evade the tax is a violation as well of Section 145 (b).

The result of the decision of the Court of Appeals below and of the court in the *Taylor* case is that an important question of Federal law has been decided by two different Courts of Appeals in a conflicting manner, and both of the decisions appear to conflict with the decision of this court in *Spies* v. *United States.* Internal Revenue Code, Section 145 (c), was repealed in 1949, but it is now substantially embodied in Section 3809 (a). The problem persists of the relation between that section and Section 145 (b).

The decision in the *Taylor* case seems to be plainly erroneous. It is based on the notion that the "making and subscribing" of an income tax return means something less than the filing of it. The making and subscribing of a return must imply the use of it as a return, for otherwise it is not a return at all but a mere piece of paper. If the mere "subscribing" of a false return would be a crime under Section 145 (c), then the word "makes," which under the statute is an essential element of the offense, would become meaningless surplusage.

The decision of the Court of Appeals below is likewise erroneous, we contend. It is based on the notion that there may be a violation of Section 145 (c) by the filing of a false return without an intent to defeat or evade the tax. The more closely considered, the more untenable this theory appears. First, it is difficult to believe that the Congress intended under Section 145 (a) to make the failure to file any return, if done for the purpose of defeating or evading a tax, only a misdemeanor, as the *Spies* case holds, while at the same time providing in Section 145 (b) that the omission of income from a filed return should be the most serious felony in the revenue laws. Second, if Section 145 (c) was intended to punish the filing of a false return willfully made for some other purpose than an intent to defeat or evade the tax, as it must have been to sustain the interpretation of the Court of Appeals below, it is difficult to understand why the section was placed in the Internal Revenue Code at all. On that theory it would not be for the protection of the revenue, for the return, although false, would not affect the amount of the tax. Third, Section 145 (c) requires not only that the making of the false return be willful, but also that the return be false as to a "material matter." In *United States* v. *Koppelman,* 61 F. Supp. 1007, the defendant was indicted under Section 145 (c) for filing a partnership return which he did not believe to be true

and correct as to every material matter. The court held at page 1008:

> "The gross income was incorrectly stated, at least in the amount of the omission, by approximately $12,000. This fact, as reprehensible as it may seem, properly considered in the light of the related facts, would not support an inference that the understatement of gross income was either 'materially' false or 'willfully' made, the criteria prescribed by the statute. This conclusion is confirmed by the complete absence of any proof that the individual return of either the defendant or his partners was 'materially' affected by the understatement of gross income, a fair test of materiality."

Section 145 (c) seems to have been patterned on the perjury statute, 18 U.S.C. § 231 (Criminal Code, § 125). Under the perjury statute perjury on a tax return is as to a "material matter" only if it affects the amount of the tax or the enforcement of the tax statutes. In *United States* v. *Lamson,* 165 Fed. 80, 84, the court held misinformation on a wholesaler's return under the Oleomargarine Act not to be false as to a material matter within the perjury statute because "not material to the amount of tax which the wholesaler was to pay, or to any issue or claim"; also *United States* v. *Goldstein,* 169 F. (2d) 666, 671. Thus, in order to be false as to a "material" matter, the error must result in a diminution of tax or impede the enforcement of the tax statutes, and if this be so, it is difficult to see how such an error could be willfully made unless with an intent to defeat or evade the tax.

(*e*) *The questions presented above on this phase of the case have not been presented by any petition for certiorari previously determined by this court.*

This court has previously denied certiorari in cases relied upon by the Court of Appeals below. *Cave* v. *United States,* 159 F. (2d) 464, certiorari denied, 331 U.S. 847, rehearing denied, 332 U.S. 786; *Myres* v. *United States,* 174 F. (2d) 329, certiorari denied, 338 U.S. 849; *United States* v. *Croessant,* 178 F. (2d) 96, certiorari denied, 339 U.S. 927. An examination of the petitions and briefs filed in this court in each of these cases discloses that the points here argued were not there presented. Thus, in *Cave* v. *United States,* the petitioner's argument was that the mere filing of a false and fraudulent income tax return was nothing more than a misdemeanor under Section 145 (a) and Section 3616 (a) of the Internal Revenue Code. No argument based on Section 145 (c) appears to have been made before the Court of Appeals or in the petition and brief for certiorari. Furthermore, at the time, the decision in *Jones* v. *United States* had not yet been rendered, so that no claim of a conflict of decision between the Circuits was or could have been made. In *Myres* v. *United States* the defendant in his petition and brief for certiorari conceded the correctness of the decision of the Circuit Court of Appeals in *Cave* v. *United States* and argued a somewhat different question (pp. 24-25 of Petition and Brief). In *Croessant* v. *United States* the defendant in his petition and brief for certiorari argued some of the same points with reference to the relation between Section 145 (b) and Section 145 (c). It does not appear, however, from the report in the Circuit Court of Appeals that the same point had been argued before the Court of Appeals. In any event, the Court of Appeals did not make any decision as to the relation between Section 145 (b) and Section 145 (c). The conflict between Courts of Appeals in different Circuits

as to the relation between Section 145 (b) and Section 145 (c) arises by the decision of the Court of Appeals below in the present case in conflict with that in the *Taylor* case, and is presented to this court for the first time in the present petition.

III. The Enactment in 1942 of Internal Revenue Code, Section 145 (c) Repealed Criminal Code, Section 35 (A), so Far as the Offenses Defined in Section 145 (c) are Concerned.

(*a*) *What happened in the trial court.*

Count 5 of the indictment alleged that the defendant

> "Did knowingly and willfully make and cause to be made false and fraudulent statements and representations in the matter within the jurisdiction of a department and agency of the United States, namely, the Collector of Internal Revenue for the Internal Revenue Collection, District of Massachusetts" in that the defendant "did file and cause to be filed with the Collector of Internal Revenue for the Internal Revenue Collection, District of Massachusetts a false and fraudulent joint income tax return for the calendar year 1946 . . . in violation of Section 35 (A) of the Criminal Code, as amended; 18 U.S.C. Sec. 80." (R. 4-5.)

At the close of the government's evidence and again at the close of all the evidence the defendant filed motions to dismiss count 5 of the indictment and also motions for acquittal under count 5 and after the verdict filed a motion in arrest of judgment under count 5. All of these motions were denied (R. 8-11, 18). The defendant contended in support of his motions that by the enactment in 1942 of Internal Revenue Code, Section 145 (c), the Congress repealed Criminal Code, Section 35 (A), so far as offenses

defined in that new section of the Internal Revenue Code are concerned.

The defendant did not contend that Criminal Code, Section 35 (A), was repealed for all purposes or even that it was repealed for all purposes so far as Internal Revenue matters are concerned. For example, Internal Revenue Code, Section 145 (c), applies only to willfully making and subscribing a "return." This, perhaps, would not cover false or fraudulent representations made in connection with an audit of a return, such misrepresentations not being a "return" within the meaning of Internal Revenue Code, Section 145 (c). There are, therefore, distinctions between Internal Revenue Code, Section 145 (c), and Criminal Code, Section 35 (A). The defendant did contend, however, that where the intent is to make out a violation of Section 35 (A) by the filing of a false return, there is no distinction between the offenses defined in Section 35 (A) and in Section 145 (c).

The District Court ruled to the contrary, stating that he regarded himself as bound by higher authority, with which he expressed grave doubt (R. 214-215). The decisions by which the District Court felt bound are *United States* v. *Gilliland,* 312 U.S. 86, and *Bartlett* v. *United States,* 166 F. (2d) 920, 927.

(*b*) *The decision of the Court of Appeals below is in conflict with the decision of this court in United States v. Tynen, 11 Wall. 88, 92-93, and is based upon a misconstruction of the decision of this court in United States v. Gilliland, 312 U.S. 86.*

Criminal Code, Section 35 (A), at the times in question, provided so far as material:

> ". . . or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or

> device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Internal Revenue Code, Section 145 (c), provided:

> "Any individual who wilfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code."

It is apparent that the offense defined in Internal Revenue Code, Section 145 (c), was already an offense under the more general provisions of Criminal Code, Section 35 (A). The punishment provided in Internal Revenue Code, Section 145 (c), is, however, less than that which was provided in Criminal Code, Section 35 (A). The defendant contends that the enactment of Internal Revenue Code, Section 145 (c), plainly shows a Congressional intent that the punishment for the offense defined should be that there prescribed, and that, to the extent that Internal Revenue Code, Section 145 (c), applies, Criminal Code, Section 35 (A), is thereby repealed.

It is, of course, true that repeals by implication are not favored. However, it is likewise well established by this court that, if a later statute punishes the same act which

is punishable by an earlier law but prescribes a different penalty, the two statutes are repugnant to each other, and the earlier statute is repealed by implication to the extent of the repugnancy. *United States* v. *Tynen,* 11 Wall. 88, 92-93.

The *Gilliland case,* relied upon by the District Court and the Court of Appeals below, does not support the position taken by those courts. In the *Gilliland* case the same provision of the Criminal Code was involved as in the present case, but the second statute was quite different from Internal Revenue Code, Section 145 (c). The other statute was a section of the Act of February 22, 1935, the so-called "Hot Oil" Act. This section provided:

> "Any person knowingly violating any provision of this chapter or any regulation prescribed thereunder shall upon conviction be punished by a fine of not to exceed $2,000 or by imprisonment for not to exceed six months, or by both such fine and imprisonment."

See 15 U.S.C. § 715e. The statute authorized the President to prescribe regulations (under Section 715d)

> ". . . requiring reports, maps, affidavits, and other documents relating to the production, storage, refining, processing, transporting, or handling of petroleum and petroleum products, . . ."

Under this provision the Secretary of the Interior, acting under a delegation from the President, promulgated regulations requiring monthly reports. The defendant was indicted for a violation of Criminal Code, Section 35, in filing a report alleged to be false and fraudulent. The Court held that the provision of the Criminal Code was applicable and had not been repealed by any provision of the "Hot

Oil'' Act. This was certainly a correct decision, for although the ''Hot Oil'' Act punished the violation of any provision of the Act or any regulation prescribed under it, it did not specifically punish the knowing and willful making of a false or fraudulent statement. The offense defined in the ''Hot Oil'' Act was a different one from that defined in the Criminal Code. Nothing in the *Gilliland* case is inconsistent with our position.

The other cases cited in the opinion of the Court of Appeals below (R. 900) are clearly distinguishable for the following reasons:

Bartlett v. *United States,* 166 F. (2d) 920, 927—The court's decision was based on the ground that the two offenses were not the same, whereas in our case we contend that the statutes are the same. Section 145 (c) was not involved in the *Bartlett* case.

United State v. *Heine,* 149 F. (2d) 485, 487, certiorari denied, 325 U.S. 885—The court pointed out at page 487 that ''the penalty applicable under the Presidential Proclamation and the regulations pursuant thereto was not specifically designed to cover falsification of an application. It covers the obvious omission to apply for or procure a certificate of identification.'' Furthermore, there might be some question whether a Presidential Proclamation could repeal a criminal statute enacted by Congress.

Ex Parte Berkoff, 65 F. Supp. 976—The indictment was based upon acts which took place before Section 145 (c) was enacted. Furthermore, the indictment was based, not upon the filing of a false return, but upon misrepresentations made in the course of an audit, and such misrepresentations would not be a violation of Section 145 (c).

IV. The Conviction on Count 5 Cannot be Sustained as a Conviction under Internal Revenue Code, Section 145 (c), as the Court of Appeals Ruled, because it was Not Submitted to the Jury under that Section.

(*a*) *What happened in the trial court.*

Upon the defendant's motion to dismiss count 5 and for an acquittal on count 5 the District Court upheld the count as alleging an offense under 18 U.S.C. § 80, which was Criminal Code, Section 35 (A) (R. 214). In his charge to the jury the trial judge, referring to count 5, read the pertinent provisions of 18 U.S.C. § 80, to the jury and instructed them as to the meaning of the terms contained in that section (R. 683, 684). In no way did the trial judge attempt to instruct the jury as to the provisions of Internal Revenue Code, Section 145 (c). The court did not read the text of Section 145 (c) or paraphrase it or attempt to define the elements in it or instruct the jury that count 5 should be regarded by them as if it attempted to state an offense under Section 145 (c) instead of Criminal Code, Section 35 (A).

(*b*) *The decision of the Court of Appeals below is in conflict with the decisions of this court and of courts in other Circuits.*

The Court of Appeals below ruled that, even if count 5 stated no offense under Criminal Code, Section 35 (A), because of the implied repeal of this statute by Internal Revenue Code, Section 145 (c), nevertheless, the conviction might be sustained under Section 145 (c). This ruling involves two steps, not clearly separated by the Court of Appeals: First, it involved a ruling that count 5 was sufficient to state an offense under Section 145 (c). Second, it involved a ruling, assuming the sufficiency of the allega-

tions of count 5, that the conviction under that count may be sustained under Section 145 (c) even though the instructions on Count 5 were given to the jury on the basis of Criminal Code, Section 35 (A).

The ruling that count 5 was sufficient to sustain an offense under Section 145 (c) is contrary to the decisions of this court and of the courts of other Circuits. The defect in the count is not merely in the miscitation of the statute, but in the language of the indictment itself, for even if it incidentally alleges facts sufficient to state an offense under Section 145 (c), it was plainly drawn to state an offense under Section 35 (A). As a count designed to state an offense under Section 145 (c) it could not properly be upheld upon a motion to dismiss the count. *United States* v. *Stafoff,* 260 U.S. 477, 481. *Hartson* v. *United States,* 14 F. (2d) 561, 562 (C.C.A. 2, 1926).

What is more serious, perhaps, is the precedent established by the decision of the Court of Appeals below that a count framed under one statute and submitted to the jury under an instruction quoting and explaining that statute may be sustained by a court on appeal as a conviction of the defendant under a different statute. Such a procedure does violence to fundamental principles of our jury system. A verdict of guilty returned by a jury upon a count which states facts constituting an offense cannot be sustained if the court has failed to define and explain to the jury the elements of the statutory offense with which the defendant was charged. *Morris* v. *United States,* 156 F. (2d) 525 (C.C.A. 9, 1946). The ruling of the Court of Appeals below is in direct conflict with the ruling of the District Court for the Southern District of Alabama in *United States* v. *Martini,* 42 F. Supp. 502, 510-511. The cases relied upon by the Court of Appeals do not support its position. *United States* v. *Hutcheson,* 312 U.S. 219, 229,

arose on an appeal from a judgment quashing an indictment. The sole question was the sufficiency of the indictment. In *Williams* v. *United States,* 168 U.S. 382, 389, the ruling of the court on this point was merely that the court below "did not err in overruling the demurrer to the first count of the respective indictment." Again the question was only as to the sufficiency of the indictment.

Respectfully submitted,

ROBERT F. BRADFORD,
JOHN A. PERKINS,
WILLIAM L. McGOVERN,
BERT B. RAND.